JANUARY 2005
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CRIMINAL PROCEDURE SYLLABUS

INTRODUCTION

This instructional segment will give an overview of the many areas of procedural law with which you must become familiar before representing a criminal defendant in United States District Court. It is assumed that before the lecture each bar applicant will have looked over the following RULES OUTLINE. Together, the outline and lecture constitute a tried and true recipe for a successful examination.

Some lecture time will be taken up by a discussion of preliminary proceedings (including detention hearings), plea negotiations and sentencing in the United States District Court. Part II of the course materials -- The Addendum -- contains replication of some sample documents, rules, and materials that will also be discussed. Questions of a general nature are invited during the lecture.

CAVEAT

No attorney should consider even a limited federal criminal practice without ownership of and familiarity with:

1. Current edition of West's Federal Criminal Code and Rules

2. Local Rules of the United States District Court for the District of Rhode Island

2. Current edition of the United States Sentencing Guidelines Manual.[1]

RULES OUTLINE

[1] The future of the sentencing in the federal courts is uncertain following the United States Supreme Court's opinion in *Blakely v. Washington, 124 S. Ct. 2531 (2004)*. The case, decided last June, involved a Washington State sentencing scheme in which trial judges determined whether the trial evidence required various sentencing enhancements. The Court ruled that the scheme unconstitutionally impinged on defendant's Sixth Amendment right to a jury trial. Almost immediately, in federal courts across the country, the United States Sentencing Guidelines were challenged as being exactly comparable to Washington's guidelines in all respects material to the Blakely decision. In October, the United States Supreme Court heard expedited oral argument in two such cases, *United States v. Fanfan, 2004 U.S. Dist. LEXIS 18593, 2004 WL 1723114 (D. Me. June 28, 2004), cert. granted, 2004 U.S. LEXIS 4789, 73 U.S.L.W. 3073, 3074 (U.S. Aug. 2, 2004) (No. 04-105),* and *United States v. Booker, 375 F.3d 508 (7th Cir. 2004), cert. granted, 2004 U.S. LEXIS 4788, 73 U.S.L.W. 3073, 3074 (U.S. Aug. 2, 2004) (No. 04-104)*. It is hoped that early Supreme Court decisions in those two cases will resolve whether (and to what extent) *Blakely* applies to the federal guidelines.

I. PRELIMINARY PROCEEDINGS

Rule 3 - COMPLAINT

A Complaint is one way in which a criminal case can be initiated in the United States District Court. It is a written statement of the essential facts constituting the offense charged. The statement must be made under oath before a magistrate judge.[2]

Rule 4 - ARREST WARRANT OR SUMMONS ON A COMPLAINT

If the magistrate judge finds that the Complaint or one or more affidavits filed with the Complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the magistrate must issue an arrest warrant.

Case law has established that probable cause may be based upon hearsay evidence, in whole or in part, and upon other forms of evidence that may be inadmissible at trial.

A Warrant must:

1. contain the defendant's name or if the defendant's actual name is unknown, a name or description by which the defendant can be identified;
2. describe the offense charged in the complaint;
3. command that the defendant be arrested and brought without unnecessary delay before a magistrate judge or, if none is reasonably available, before a state or local judicial officer, and
4. be signed by a judge.

A warrant is executed by arresting the defendant. It may be executed within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest. It is not necessary that the warrant be in the physical possession of arresting officer.

As an alternative to a warrant, at the request of the United States Attorney, the magistrate judge may issue a summons. The summons is served on the defendant personally, by leaving it with a person of suitable age and discretion at the defendant's residence or usual abode, or by mailing it to the defendant's last known address. In form, a summons differs from a warrant only in that, instead of commanding an arrest, it must require the defendant to appear before a magistrate judge at a specific time and place. If a defendant fails to appear as summoned, a judge may, and upon request of the United States Attorney must, issue a warrant.

Rule 5 - INITIAL APPEARANCE

The individual who is arrested, whether with or without warrant, must be brought before a magistrate judge without unnecessary delay.[3] If the arrest is without a warrant, the prosecution must file a complaint promptly in the district where the offense is alleged to have been committed.

At an initial appearance the judge must inform the defendant of:

1. the charge against the defendant and of any affidavit filed with it;
2. the defendant's right to retain counsel or to request appointment of counsel if the defendant cannot obtain counsel;
3. the circumstances under which the defendant may secure pretrial release;
4. any right to a preliminary hearing;
5. the defendant's right not to make a statement and the fact that any statement made by the defendant may be used against the defendant.

The judge must allow the defendant a reasonable opportunity to consult with counsel and must either detain or conditionally release the defendant as provided by statute or the Rules of Criminal Procedure.

Video teleconferencing of an initial appearance is permissible if the defendant consents. (Rule 5(a),(b),(d)&(f))

Generally, if a defendant is arrested in a District other than where the offense was allegedly committed, the initial appearance must be in the District where the arrest occurred.[4] Under those circumstances, the magistrate judge must:

1. Inform defendant of the provisions of Rule 20; and
2. Conduct a preliminary hearing if required under Rule 5.1; and
3. Once the government produces a warrant, and the judge finds the defendant is the same person named in the warrant indictment or information), transfer the defendant to the district where the offense was allegedly committed. (Rule 5(c))

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[2] If a magistrate judge is not reasonably available, complaint may be made under oath before a state/local judicial officer.

[3] If a magistrate judge is not reasonably available, the defendant may be brought before a state/local judicial officer.

[4] The initial appearance can also occur an adjacent District if

1. it can occur more promptly, or
2. the offense is alleged to have occurred there and the appearance can take place on the same day.

Rule 5.1 - PRELIMINARY HEARING

For offenses other than petty offenses, the magistrate judge must conduct a preliminary hearing, unless:

1. The defendant waives the hearing; or
2. The defendant is indicted or an information is filed before the date set for the hearing; or
3. The defendant is charged with a misdemeanor and consents to trial before a magistrate judge.

A preliminary hearing must be held not later than 10 days after the initial appearance if the defendant is in custody, and not later than 20 days if defendant is not in custody. This time may be extended upon the defendant's consent and a showing of good cause. The magistrate judge may extend the time without the defendant's consent upon a showing of extraordinary circumstances and a finding that that justice requires the delay.

During a preliminary hearing, the magistrate judge may consider hearsay evidence. A defendant may cross examine adverse witnesses and introduce evidence, but may not object to evidence on the grounds that it was illegally obtained. To hold the defendant to answer in District Court, the judge must find that the evidence shows probable cause to believe an offense has been committed and that the defendant committed it. Otherwise, the judge must dismiss the complaint and the defendant must be discharged. However, even if the defendant is discharged for lack of probable cause, the government may later prosecute the defendant for the same offense. (Rule 5.1(a),(c),(d),(e)&(f))

If the defendant was arrested in a district other than where the offense was committed, the defendant may elect to have the preliminary hearing in the district where the prosecution is pending. (Rule 5.1(b))

II. INDICTMENT AND INFORMATION

Rule 6 - THE GRAND JURY

A grand jury must have not less than 16 or more than 23 members. The court may also select alternate jurors. (Rule 6(a))

A grand jury is subject to challenge based on the ground that it is not legally drawn, summoned or selected. Individual jurors may be challenged as not legally qualified. However,

an indictment will not be dismissed on the grounds that a grand juror was not legally qualified if at least 12 qualified jurors concurred in the indictment. (Rule 6(b))

While in session, only government attorneys, the witness under examination, interpreters, and a court reporter or an operator of recording device may be present. Except where an interpreter is needed to assist a hearing-impaired or speech-impaired grand juror, no person other than jurors may be present during deliberations or voting. (Rule 6(d))

Recording And Disclosing The Proceedings

All proceedings, except deliberations or voting, shall be recorded.

Witnesses before the grand jury may disclose their testimony.

The government attorneys, interpreters, court reporters, the operators of recording devices and the grand jurors themselves are prohibited from disclosing grand jury matters, except that disclosures may be made to;

1. government attorneys for use in performing their duties;
2. to government personnel (including personnel of a state or subdivision thereof or Indian tribe) where deemed necessary by government attorneys to enforce federal criminal law;
3. to government and banking regulators for enforcing civil forfeiture and civil banking laws;
4. to another federal grand jury;
5. to federal law enforcement and national security agencies in circumstances regarding certain foreign intelligence and counterintelligence matters (as defined in the Rules and by statute).

The court may authorize disclosure of a grand jury matter:

1. in connection with a judicial proceeding;
2. upon a defendant's request with a showing that a ground may exist to dismiss the indictment due to matters occurring before the grand jury, and
3. at request of a government attorney, to disclose violations of state or Indian tribal criminal law or military criminal law to the relevant law enforcement agency.

Return of an Indictment

An indictment requires concurrence of at least 12 grand jurors. An indictment is returned in open court by foreperson or deputy foreperson. (Rule 6(f)) However, the magistrate judge to

whom the indictment is returned may direct that the indictment be kept secret, that is, "sealed", until the defendant is in custody or has been released pending trial. (Rule 6 (e)(4))

Rule 7 - <u>THE INDICTMENT AND THE INFORMATION</u>

The government must obtain an indictment for any offense punishable by death or by a term of imprisonment exceeding one year. Misdemeanors, offenses which are punishable by imprisonment for one year or less, may be prosecuted by indictment, information, or complaint.

The government may file an information charging an offense punishable by a term of imprisonment exceeding one year only if the defendant – in open court, after having been informed of the nature of the charges and of the defendant's rights –waives prosecution by indictment. (Rule 7(b))

An indictment or information shall contain essential facts of the offense and the citation of the law violated.

The defendant may move for a Bill of Particulars within 10 days after arraignment or, if the court permits, at a later time.[5]

Rule 8 - <u>JOINDER OF OFFENSES OR DEFENDANTS</u>

<u>Offenses</u> – A defendant may be charged with two or more offenses in the same indictment or information, whether the offenses are felonies or misdemeanors or both. There should be a separate count for each of the offenses charged. The alleged offenses should be of same or similar character or arise from the same act or transaction or from acts or transactions constituting parts of a common scheme or plan.

<u>Defendants</u> - Two or more defendants may be charged in the same indictment or information if they participated in the same act or transaction or in the same series of acts or transactions which constitute the alleged offense or offenses. Defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

<u>Prejudicial Joinder</u> - A court may order relief from prejudicial joinder in indictment or information, for either government or defendant, by ordering separate trials of counts, severance of defendants' trials, or other relief that justice requires. (Rule 14)

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[5] Whether a Bill of Particulars is to be ordered is within the sound discretion of the trial judge. One need be granted only in cases where "the accused, in the absence of a more detailed specification, will be disabled from preparing a defense, caught by unfair surprise at trial, or hampered in seeking the shelter of the Double Jeopardy Clause." *United States v. Sepulveda, 15F.3d 1161, 1192 (1st Cir. 1993)* As a practical matter, they are infrequently granted.

III. PRETRIAL

Rule 9 – ARREST OR SUMMONS

Following the return of an indictment, the court must issue a warrant for each defendant named in the indictment – unless the government requests a summons.

Rule 10 - ARRAIGNMENT

At arraignment, the defendant is told in open court of the charge(s) against defendant, and the defendant is given a copy of the indictment or information before being asked to plead.

Defendant must be present unless:

1. The defendant has been charged by indictment or misdemeanor information (no exception for felony information); and
2. The defendant signs a written waiver; and
3. The court consents to the waiver.

If defendant consents, an arraignment can be done by video teleconferencing.

At arraignment, the defendant's counsel is advised of the identity of the District Judge to whom the case is assigned[6] and the date of the pretrial conference. (Local Rules 7 and 9)

The counsel is also advised of the discovery obligations of the government; the discovery obligations of the defendant; and the time within which pretrial motions and responses to such motions must be filed. See Arraignment And Pretrial Discovery Order.

Rule 11 - PLEAS

In General; Advice to Defendant

The defendant may plead guilty, not guilty, or (with the court's consent) nolo contendere.

Before accepting a plea of guilty or nolo contendere, the court must place the defendant under oath, address the defendant personally in open court, and advise the defendant of certain rights which are explicitly set forth in the rule. The court must ensure the plea is voluntary. The court must also be satisfied that there is a factual basis for the plea. (Rule 11(a)(1)&(b))

Conditional Plea

Under certain circumstances, a defendant may enter a "conditional plea," that is, plead guilty or nolo contendere, while reserving the right to appeal an adverse ruling on a specified pretrial motion. (Rule 11(a)(2)) This type of plea can be entered only with the consent of the court and the government. A defendant who prevails on appeal may withdraw his plea.

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[6] Generally, new cases are assigned to District Judges on a random basis.

Plea Agreement

In the United States District Court, judges do not participate in plea negotiations.

If a plea agreement between government and defendant is made under Rule 11(c)(1)(B), the court must advise defendant that the recommendations and requests included in the agreement are not binding on the court. Furthermore, a defendant must be informed that she (or he) has no right to withdraw a guilty plea if court does not follow the parties' recommendations or requests. (Rule 11(c)(3)(B))

A plea agreement submitted under Rule 11(c)(1)(A) or (C), contains specific recommendations or requests which the parties want the court to accept as binding on the defendant's sentencing. This is often called a "binding" plea agreement. The court may accept or reject such a plea agreement, or defer a decision until the court reviews a presentence report. In many instances, while deferring, the court may accept (or even require) the defendant's plea on a provisional basis. If the court accepts the plea agreement, the agreed-upon recommendations and requests are binding on the court and will be included in the defendant's sentence. If a plea has been entered, provisionally, pursuant to Rule 11(c)(1)(A) or (C), and the court, after reviewing a presentence report, decides not to accept the recommendations or requests included in the plea agreement, the court must give defendant an opportunity to withdraw guilty plea. (Rule 11(c)(5)(B))

A plea withdrawn by defendant and plea discussions relating thereto may not, except in very limited circumstances, be used as evidence in any civil or criminal case against the defendant. (Rule 11(f) & F.R.Evid. 410)

Rule 12 - PLEADINGS AND PRETRIAL MOTIONS

Any defense, objection or request capable of determination without the trial of the general issue may be raised before trial by motion, within the period specified in the Arraignment And Pretrial Discovery Order or as otherwise allowed by the court.

The following motions must be raised prior to trial:

1. Motions alleging defects in instituting the prosecution;
2. Motions alleging defects in the indictment or information (other than jurisdictional);
3. Motions to suppress evidence (Rule 41);
4. Motions for severance of charges or defendants (Rule 14);
5. Motions for discovery (Rule 16).

Caveat: Be sure to observe the filing deadlines set forth in the Arraignment And Pretrial Discovery Order and request any extensions well before the deadline. Failure to file the type of motions which are listed above (and others which may be specified in subsequent orders of the trial judge) within the times allowed may constitute waiver of whatever claim is involved.

Local Rule 12 (f) – DUTY TO ADDRESS SPEEDY TRIAL ACT

Refer to the rule itself for details. However, in summary, it requires that any pretrial motion filed after arraignment by either the defendant or the government must include:

1. a statement of whether or not any delay occasioned by the making, hearing or granting of the motion will constitute excludable time, as defined by 18 USC §3161 (h), The Speedy Trial Act., and
2. If so, an estimate of the time to be excluded or a statement describing how excludable time should be determined by reference to a future event, and
3. A statement of whether or not there has been any past or ongoing delay, related or unrelated to the subject matter of the motion.

Rule 12.1 - NOTICE OF AN ALIBI DEFENSE

The government's attorney may request, in writing, that the defendant notify the government's attorney of any intended alibi defense. The request must state the time, date and place of the offense.

Within 10 days after the request, the defendant shall serve written notice of the defendant's intention to offer defense of alibi, stating the specific place where defendant claims to have been at the time of the alleged offense and the names, addresses and telephone numbers of witnesses upon whom defendant will rely to establish such alibi.

Within 10 days after defendant's response, the government shall serve written notice of the names, addresses and telephone numbers of witnesses who will establish defendant's presence at the scene and each rebuttal witness to defendant's alibi defense.

Rule 12.2 - NOTICE OF AN INSANITY DEFENSE; MENTAL EXAMINATION

A defendant who intends to rely on the defense of insanity must, within the time provided for the filing of pretrial motions, notify the government attorney, in writing, of such intent and send a copy of notice to the clerk. A defendant who fails to do so cannot rely upon the defense of insanity.

A defendant who intends to introduce expert evidence relating to mental disease or defect or any other mental condition bearing on issue of guilt or the issue of punishment in capital case, must, within the time provided for the filing of pretrial motions, notify the government attorney, in writing, of such intent and send a copy of notice to the clerk. Failure to give notice may result in the exclusion of any expert evidence offered on the issue.

If a defendant files a notice of intent to rely on the defense of insanity, the court must, upon the government's motion, order a psychiatric or psychological examination of the defendant. If the defendant intends to introduce expert testimony regarding a mental condition, upon the government's motion, the court may order such an examination.

Rule 15 - DEPOSITION

A party may move that prospective witness be deposed to preserve testimony at trial. The court may order a deposition where there are exceptional circumstances and it is in the interest of justice.

Rule 16 - DISCOVERY AND INSPECTION

Upon request of a defendant[7], government must furnish:

1. the substance of defendant's oral statements, made before or after arrest, and made in response to interrogation by a person who the defendant knew was a government agent, if the government intends to use the statement at trial;
2. any written and recorded statements of the defendant known to the government and under its control;
3. any written record containing the substance of such oral statements by defendant in response questioning by person known by the defendant to be a government agent, and

   d. a defendant's grand jury testimony;

Upon the defendant's request, the government must also provide the defendant with

1. a defendant's prior criminal record.
2. the opportunity to inspect and copy documents and tangible objects which:
   a. are material to the defense;
   b. are intended for use in the government's case in chief, or

[7] Under local Rule 12(e), as reflected in the standard Arraignment and Pretrial Order, the discovery procedure is automatic. The parties must, within a specified time period, to confer and exchange written Rule 16 discovery requests or file a written waiver of discovery with the clerk.

c. were obtained from or belong to the defendant;

3. reports of examinations and tests (which are material to the defense or intended for use in the government's case);
4. a summary of expected testimony of expert witnesses.
5. any material or information which tends to negate the guilt of the accused or reduce punishment for the offense charged. (Local Rule 12 (e)A.5.)

The government must also inform the defendant whether there is any electronic surveillance (including wiretapping) of conversations to which the defendant was a party or of his premises. (Local Rule 12 (e)B.2.)

If a defendant receives discovery from the government, the defendant must furnish reciprocal discovery to government. See Arraignment And Pretrial Discovery Order. (Local Rule 12(e)) and Rule 16 (b)) This obligation covers documents and tangible objects, reports of examinations and tests, and expert witness testimony – each category of evidence defined in much the same manner as it is for the government.

Statements of prospective government witnesses, referred to as "Jencks material", are disclosed at trial or, at the discretion of the government, earlier (18 U.S.C. § 3500). In practice, exactly when defense counsel receives Jencks material will differ on a case by case, prosecutor by prosecutor, basis. Generally, it is made available before trial.

Reports, memoranda, or other internal government documents made by a government attorney or other government agent, made in connection with the investigation or prosecution of the case, are not subject to discovery or inspection.

Rule 17 - SUBPOENA

Subpoenas are issued by the clerk.

A defendant who is unable to pay the fees of the witness may apply *ex parte* to the Court for the issuance of the subpoena. Defendant must show the presence of the witness is necessary to an adequate defense.

IV. VENUE

Rule 20 - TRANSFER FOR PLEA OR SENTENCE

A prosecution can be transferred from the district where the indictment, information or complaint is pending to a district where a defendant is arrested, held, or present, if:

1. The defendant states in writing that the defendant wishes to plead guilty or nolo contendere; and
2. The defendant, in writing, waives trial in the district where the indictment, information, or complaint is pending; and
3. The defendant consents, in writing, to a court in transferee district disposing of case; and
4. The written statement is filed in transferee district, and
5. The U. S. Attorneys in both districts must approve of the transfer.

If a defendant pleads not guilty in the transferee district, case is returned to district where indictment, information, or complaint was pending.

V. TRIAL

Rule 23 - JURY OR NONJURY TRIAL

A defendant has right to trial by jury. Approval of the court and consent of the government is required for waiver of a jury trial.

A jury consists of 12 jurors. At any time before the verdict, the parties may stipulate, with approval of the court, that the jury shall consist of fewer than 12. After deliberations have begun, and without a stipulation by the parties, the court may excuse a juror for good cause and proceed with a jury of 11.

Rule 24 - TRIAL JURORS

The court may conduct examination of prospective jurors, or permit defense counsel and the government to conduct examination.

A magistrate judge may conduct jury selection unless the defendant or his attorney registers an objection. *United States v. Desir, 273 F.3d 39 (1st Cir 2001*), also, See *Peretz v. United States, 501 U.S. 923, 934-36, 937, 940, 115 L. Ed. 2d 808, 111 S. Ct. 2661 (1991)* (finding that defendant has no constitutional right to have an Article III judge preside at jury selection unless defendant objects to judge's absence)

If the court examines the jurors, it must permit defense counsel and government to supplement the examination with questions that the trial judge considers proper.

In non-capital felony cases, the government has six peremptory challenges and the defendant has ten (or possibly more in multiple defendant cases). Each party has from 1 to 3

additional peremptory challenges to be used only to remove alternate jurors. The number of challenges depends upon the number of alternates selected.

Local Rule 15 - EMPANELING TRIAL JURY

The court has the discretion to select jurors according to the "struck" method, and usually does. Under that method, the peremptory challenges are exercised as follows:

government-1; defendant-2; government-1; defendant-2; government-1; defendant-2; government-1; defendant-2; government-1; defendant-1; government-1; defendant-1.

Rule 26.2 - PRODUCING A WITNESS'S STATEMENT

After a witness, other than the defendant, has testified on direct examination, the court, on motion of the party who did not call the witness, shall order the other party to produce any statements of the witness in their possession relating to the subject matter of the witness's testimony. See also 18 U.S.C. § 3500. In practice, both to avoid delay and to allow the parties a reasonable opportunity to prepare, judges, by order or suggestion, cause the exchange of statements in advance of witnesses' testimony.

The court can order that an entire statement be produced if it relates to the subject matter of the witness' testimony. The court can also redact portions of a statement.

A statement is defined as:

1. A written statement, signed or otherwise adopted or approved;
2. Grand jury testimony;
3. A substantially verbatim, contemporaneously recorded oral statement contained in a recording or transcription of recording.

This rule applies at trial, at suppression hearings under Rule 12 and, to the extent specified in the Rules, at preliminary hearings (Rule 5.1(h)), sentencing hearings (Rule 32(i)(2)), detention hearings (Rule 46(j)) and other proceedings.

Rule 29 - MOTION FOR A JUDGMENT OF ACQUITTAL

At close of the government's evidence and at the close of all the evidence, the court, on motion of the defendant or of its own motion, may order entry of judgment of acquittal if the evidence is insufficient to sustain a conviction. Defendant need not reserve the right to offer evidence if the motion for acquittal made at close of the government's case is denied.[8]

[8] However, the trial court's denial of the motion is not subject to review on appeal. Recently, in *United States v. Del Rosario, 2004 U.S. App. LEXIS 22634 (Ist Cir. Nov. 1, 2004)*, the court reiterated the rule that "(a) defendant who elects to adduce evidence in [his] defense after the district court has denied a Rule 29 motion made at the close of

Court may reserve decision on the motion, proceed with the trial, submit case to jury and decide the motion before or after the jury has returned a verdict.

Motion may also be made or renewed within 7 days after a guilty verdict or after jury is discharged, whichever occurs later.

Rule 29.1 - CLOSING ARGUMENT

The government argues first. The defendant then argues. Finally, the government is allowed a rebuttal, which is limited to matters argued by the defendant, and not intended to be an opportunity to develop new arguments.

See Local Rule 17 for time limits of opening and closing statements.

Rule 30 - JURY INSTRUCTIONS

Objections to instructions must be made before the jury retires to deliberate. An objection must be specific and the grounds must be given.

LOCAL RULE 18 - JURY INSTRUCTIONS

Proposed instructions must be submitted in writing prior to opening statement, or whenever the court directs. See also Rule 30

Rule 31 - JURY VERDICT

Verdict shall be unanimous and returned by the jury to the judge in open court.

The jury can return partial verdicts, either as to multiple defendants, multiple counts, or both.

VI. JUDGMENT

Rule 32 - SENTENCING AND JUDGMENT

A presentence report shall be prepared by the probation officer and submitted to the court before sentence is imposed.

Copies of the report are furnished to the defendant, the defendant's counsel, and government's counsel at least thirty-five (35) days before sentencing. Objections to the report must be submitted within fourteen (14) days thereafter. The court may allow a late objection for good cause. (Local Rule 40.2) A failure to raise an objection within the period provided may waive the objection, both in the trial court and upon appellate review.

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the government's case is deemed to have abandoned the earlier motion and waived any objection to its denial." citing , *United States v. Amparo, 961 F.2d 288, 290 (1st Cir. 1992).*

The trial court must:

1. impose sentence without unnecessary delay;
2. be satisfied that defendant and counsel have had an opportunity to read and discuss the presentence report and any addendum;
3. permit counsel to speak on behalf of defendant;
4. address defendant personally and ask defendant if he wishes to make a statement and present information in mitigation of the sentence;
5. notify defendant of his right to appeal including the right to appeal the sentence.

A defendant may request clerk of the court to immediately prepare and file defendant's notice of appeal.

Rule 33 - NEW TRIAL

Any motion for a new trial, other than one based on newly discovered evidence, must be filed within seven (7) days after verdict or finding of guilty unless the court, within the seven (7) period, allows an extension.

The court may grant a motion for a new trial if the interest of justice so requires.

If a motion for new trial is based on the grounds of newly discovered evidence, the motion must be made within three (3) years after verdict or finding of guilty.

Rule 35 - CORRECTING OR REDUCING A SENTENCE

Within seven (7) days after sentencing, court may correct a sentence resulting from arithmetical, technical or other clear error. Otherwise, the defendant does not have a basis for requesting a change or reduction in sentence under the Rules. However, under Rule 35(b), on a motion of the government, the court, under certain conditions, may reduce a sentence of a defendant who has substantially assisted the government in the investigation or prosecution of another person who has committed an offense.

Generally, a Rule 35(b) motion must be made within one year after sentence is imposed. Although, a Rule 35(b) motion can be made after one year:

1. If the information was not known to the defendant until after the one year had expired; or
2. If the information was provided within the one year period but did not become useful until after the one year period; or

3. If the usefulness of the information was not reasonably anticipated by the defendant until after the one year period.

VII. MISCELLANEOUS ISSUES

Rule 46 - RELEASE FROM CUSTODY; SUPERVISING DETENTION

Prior to Trial - Eligibility for release prior to trial shall be in accordance with 18 U.S.C. § 3142.

Pending Sentence - Eligibility for release pending sentence or appeal shall be in accordance with 18 U.S.C. § 3143. The burden is on the defendant to establish by clear and convincing evidence that the defendant is not likely to flee or pose danger to safety of any other person or community.

After Sentencing – Before releasing a defendant, the court must also find that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal, a new trial, or a sentence of less than jail or a reduced sentence to a term of imprisonment less than the total of the time served plus the expected duration of the appeal process.

18 U.S.C. § 3141 et seq. - RELEASE AND DETENTION

A court (generally a magistrate judge in the initial appearance) may

1. release a defendant on personal recognizance or unsecured bond;
2. release a defendant on conditions;
3. temporarily detain a defendant to permit revocation of conditional release or deportation, or
4. detain a defendant.

If defendant is released on conditions, statute sets forth both mandatory and permissive conditions.

Detention hearings are held upon the motion of the government or on the court's own motion. The principal question before the court at the hearing is whether there are conditions of release that will reasonably assure the defendant's future appearance before the court as required and the safety of any other person and the community. In certain cases, e.g. a crime of violence or drug trafficking offense, there is a rebuttable presumption that no release condition or combination of conditions will reasonably assure the safety of the community.

The rules governing admissibility of evidence do not apply to detention hearings. The findings of the court must be supported by clear and convincing evidence.

18 U.S.C. § 3163 - SPEEDY TRIAL

An indictment or information must be filed within 30 days from arrest on a complaint.

A trial must commence within 70 days from the filing and making public of the indictment or information or the date of the defendant's first appearance before a judicial officer of the court in which the charge is pending, whichever date occurs last. The statute provides for certain exclusions to this 70-day "Speedy Trial clock" - e.g., the pendency of motions creates "excludable" time and stops the "Speedy Trial clock." (See the reference "Speedy Trial" Certifications on pretrial pleadings, above)

CHANGE OF PLEAS

Rule 11 and the Pre-trial Order

Generally, there is a cut-off date as to when the court will accept a plea agreement. It may differ from judge to judge, so close attention to the trial judge's pretrial order is essential to assure that time does not run out while a plea agreement is under consideration.

The areas covered by the court during a change of plea hearing include:

1. did defendant receive a copy of indictment;
2. a specification of the charges to which the defendant is pleading guilty;
3. whether defendant is currently taking medications, and if so, the effect of the medications on defendant's ability to understand;[9]
4. any past drug abuse treatment or mental health treatment undergone by the defendant;
5. the defendant's acknowledgement of potential penalties, including mandatory minimum penalties;
6. the contents of the plea agreement and the defendant's acknowledgement that certain aspects of the agreement do not bind the court or provide a basis for withdrawing a plea;

[9] The judge may require counsel to submit a written statement that defendant is not taking medication; or if defendant is taking medication, the nature of the medication and dosage. Further, if the defendant is taking medication, the judge will require written assurance that counsel has conferred with a named physician who states that it does not affect the defendant's ability to understand the charges, terms of the plea agreement, and the consequences of pleading guilty. Be sure to check with the judge's clerk well in advance of the date set for a change of plea hearing to determine the judge's practice and, if medical certification is required, to obtain the proper form.

7. the Sentencing Guidelines and departures;[10]
8. the rights that the defendant is waiving;
9. a factual basis for the plea;

Written plea agreement

The court mandates a written agreement, signed by counsel, the defendant and the prosecutor.

The basic forms of plea agreements often include:

1. the government's promise to recommend sentencing at the low end of, or within, the guidelines range;
2. the government's promise to dismiss certain counts;
3. an agreement regarding the defendant's waiver of indictment and plea to information (often when negotiations are concluded before an indictment is returned);
4. the parties' agreement that, subject to the court's approval, the plea is conditional;
5. the parties' agreement regarding the defendant's request or the government's recommendation of a downward departure under the Sentencing Guidelines,
    a. this often involves the government's promise to recommend a sentence below the guideline range (or a later reduction in sentence) based on the defendant's "substantial assistance" in the prosecution of another. See USSG §5K1.1 and Rule 35(b)
    b. the government's promise to recommend that the defendant receive the benefit of a "safety valve" (under the Sentencing Guidelines).

Generally, local judges do not accept binding or conditional pleas.

In virtually all instances, a guilty plea is required along with the defendant's specific acknowledgement, under oath, of the truth of the charge to which the plea is being entered.

THE FEDERAL SENTENCING GUIDELINES

Pre – *Blakely* (See Footnote #1, above)

The Guidelines stated objectives include:

1. honesty in sentencing - the abolition of parole;
2. reasonable uniformity – in light of past judicial and geographic disparities;

[10] Subject to the United States Supreme Court's resolution of the questions generated by *Blakely*.

3. proportionality – to make the punishment to fit the seriousness of the actual offense conduct, and
4. the capacity to affect changes in existing sentencing practices to increase sentences for certain conduct (e.g. "white collar crimes", particular narcotics offences).

There are amendments, effective every November 1. Generally, the guidelines in effect at the time of the offense of conviction apply. However, if a subsequent amendment has been made and would result in more lenient treatment for the defendant, the defendant gets the benefit of the change.

Under the guidelines, sentences are determined, not solely by the acts that constitute the offense of conviction, but by conduct related to the offense as well. Under the Guidelines, these related acts are called "relevant conduct." See *United States v. Watts, 117 S. Ct. 633 (1997)* In most instances, the guidelines call for "relevant conduct" to be factored into the court's sentencing calculations. The more significant and extensive the "relevant conduct" is, the higher the sentencing range will be.

When sentencing a defendant, a court reviews all of the evidence presented a trial (if there was one), contained in the presentence report or offered during the sentencing proceedings, and decides, based on a preponderance of the evidence standard, what should be considered "relevant conduct." As a result, crimes of which a defendant may have been acquitted and alleged crimes for which a defendant has not been tried can have a significant effect on the defendant's sentence (a practice which appears to be in direct conflict with *Blakely)*.

Departures from the guidelines sentencing range

While upward or downward departures are intended to be relatively infrequent, the Sentencing Guidelines do identify circumstances when they may be or may not be considered:

1. Specific offender characteristics - § 5H1.
    a. Discouraged departures (e.g., age)
    b. Forbidden departures (e.g., sex, race)
2. Departures under § 5K1.1 (Substantial Assistance to the Government).
3. Encouraged departures (e.g., certain aberrant behavior, victim's wrongful conduct) - See *United States v. Rivera, 994 F.2d 942 (1st. Cir. 1993)* and *United States v. Koon, 116 S. Ct. 2035 (1996)*

ADMISSIONS *PRO HAC VICE*

Local Rule 5(c):

Attorneys who are not members of the local federal bar but are in good standing in the bar of another state and the bar of another federal court, upon motion of a party, may, in the court's discretion, be admitted *pro hac vice* in a given case. The motion must be presented in a form required by the court and must include identification of a "local associate counsel." Local counsel, unless excused by the judge assigned to the case:

1. must sign and be responsible for all pleadings, motions, and other papers filed or served in the case;
2. attend all related court proceedings, and
3. be responsible to the court for the conduct of the case.

Caveat: Whenever *pro hac vice* counsel is not present, local counsel must bear the responsibility and have the authority for acting on behalf of the client. These obligations apply to all proceedings, and, in the absence of *pro hac vice* counsel, if the trial court decides to proceed, "local associate counsel" could become lead trial counsel.